

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

Docket No. 169,462

ORDER

The respondent, Coonrod & Associates Construction Company, Inc., and its insurance carrier, Aetna Casualty & Surety, request review of the Award of Special Administrative Law Judge William F. Morrissey dated June 6, 1994.

APPEARANCES

The claimant appeared by his attorney, James B. Zongker of Wichita, Kansas. The respondent, Coonrod & Associates Construction Company, Inc., and its insurance carrier, Aetna Casualty & Surety, appeared by their attorney, Edward D. Heath, Jr., of Wichita, Kansas. American States Insurance Company appeared by its attorney, Michael T. Harris of Wichita, Kansas. The Workers Compensation Fund appeared by its attorney, J. Philip Davidson of Wichita, Kansas. The respondent, P.A. Brown & Associates, did not appear.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the stipulations of the parties are listed in the Award. In addition, the parties announced at oral argument that the Workers Compensation Fund should be dismissed from this proceeding.

ISSUES

The Special Administrative Law Judge awarded claimant permanent partial disability benefits against the general contractor, Coonrod & Associates Construction Company, Inc., and its insurance carrier, Aetna Casualty & Surety Company, for a forty-two percent (42%) work disability. That respondent and insurance carrier requested this review and contend the Special Administrative Law Judge erred in both computing the percentage of work disability and by failing to order reimbursement from P.A. Brown & Associates. Those are the issues now before the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

(1) Claimant is entitled to permanent partial general disability benefits based upon a thirty-nine percent (39%) work disability. Therefore, the Award should be modified to reflect that finding.

Claimant sustained a work-related accident on January 16, 1991, while working as a plaster foreman for P.A. Brown & Associates, a subcontractor of Coonrod & Associates Construction Company, Inc. Because of representations by P.A. Brown & Associates that it did not have workers compensation insurance, claimant elected to proceed against Coonrod & Associates as permitted by K.S.A. 44-503.

Claimant's accident occurred when he was working on a scaffold and lost his balance. Knowing he only had five feet to drop, claimant attempted to jump away from the scaffold and became impaled on the end of an outrigger that was hooked to the scaffold. After a period of time, claimant was able to extricate himself from the outrigger and fell five feet to the ground. Claimant sustained injury to his right testicle, right groin area and low back.

After recuperating from the accident, claimant obtained employment with a different employer as their plastering superintendent. Although claimant's title with respondent was plaster foreman, he was a working foreman and performed manual labor. As plaster foreman, claimant was routinely required to repetitively bend, stoop, twist and lift buckets and sacks of cement weighing up to one hundred (100) pounds. Because claimant now has laborers to do that type of work, in his new position claimant does not have to perform the heavier physical labor.

At the time of the accident, claimant was earning eighteen dollars (\$18.00) per hour and worked forty-eight (48) hours per week. Based upon that evidence, the Special Administrative Law Judge found that claimant's average weekly wage was eight hundred sixty-four dollars (\$864.00). That finding is not contested and the Appeals Board adopts it as its own. In his present job, claimant is salaried and earns six hundred eighty dollars (\$680.00) per week.

The only medical expert presented, Ernest R. Schlachter, M.D., testified that he examined claimant in August, 1992 and found that claimant sustained a nineteen percent (19%) permanent partial impairment of function to the body as a whole as a result of the injuries received in the January 1991 accident. Dr. Schlachter diagnosed neuritis of the ilioinguinal nerve and two level disc disease of the lumbar spine, and believes claimant

should observe the permanent restrictions of no lifting greater than twenty (20) pounds on a repetitive basis or thirty (30) pounds in a single lift, limited stair and ladder climbing, limited walking up hills, and no repetitive bending, twisting or working in awkward positions. Also, the doctor believes claimant should have a job where he can sit part time and stand part time. Dr. Schlachter believes the accident permanently aggravated claimant's preexisting disc disease. The doctor also testified that in 1985 claimant had a laminectomy and discectomy at the L4-5 and L5-S1 intervertebral levels which constituted a ten percent (10%) permanent partial impairment of function to the body as a whole. "Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless shown to be untrustworthy, and is ordinarily regarded as conclusive." Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, Syl. ¶2, 558 P.2d 146 (1976).

The sole labor market expert presented, Jerry D. Hardin, testified claimant's ability to perform work in the open labor market had been reduced by fifty-five to sixty percent (55-60%) because of the injury claimant sustained at work and Dr. Schlachter's resulting restrictions. During the evaluation process, claimant told Mr. Hardin he thought he had a fifty (50) pound weight restriction after his 1985 back surgery. Taking that restriction into consideration, Mr. Hardin believes claimant had a pre-injury labor market comprised of jobs in the sedentary, light and medium categories. Without considering that pre-injury restriction, claimant's loss of ability to perform work in the open labor market would be ten percent (10%) higher than the fifty-five to sixty percent (55-60%) loss mentioned above. In his submittal letter claimant argued that he sustained a fifty-five to sixty percent (55-60%) loss of his ability to perform work in the open labor market, and we agree.

Because his is an unscheduled injury, claimant's entitlement to permanent partial disability benefits is governed by K.S.A. 1990 Supp. 44-510e, which provides in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment."

Based upon the evidence presented, the Appeals Board finds claimant has sustained a fifty-five to sixty percent (55-60%) loss of his ability to perform work in the open labor market. This finding is based upon the uncontroverted testimony of Mr. Hardin. Also, the Appeals Board finds claimant has sustained a twenty-one percent (21%) loss of his ability to earn a comparable wage. This finding is based upon the comparison of claimant's post-injury weekly salary of six hundred eighty dollars (\$680.00) to his pre-injury weekly earnings of eight hundred sixty-four dollars (\$864.00).

Although there is no requirement that the Appeals Board give equal weight to these two factors, there appears no reason to give one factor more weight than the other and, therefore, the percentages will be averaged which yields a thirty-nine percent (39%) work disability which the Appeals Board feels is proper to base its award of benefits.

(2) The respondent, Coonrod & Associates, and its insurance carrier, Aetna Casualty & Surety Company, request the Appeals Board to enter an order against

P.A. Brown & Associates to reimburse Coonrod & Associates and Aetna Casualty & Surety for any amounts paid in this claim. Pertinent portions of K.S.A. 44-503 provide:

“(b) Where the principal is liable to pay compensation under this section, the principal shall be entitled to indemnity from any person who would have been liable to pay compensation to the worker independently of this section, and shall have a cause of action under the workers compensation act for indemnification.

. . . .

“(e) A principal contractor, when sued by a worker of a subcontractor, shall have the right to implead the subcontractor.

“(f) The principal contractor who pays compensation to a worker of a subcontractor shall have the right to recover over against the subcontractor in the action under the workers compensation act if the subcontractor has been impleaded.”

Based upon this statute, the Appeals Board finds that the respondent, P.A. Brown & Associates, is required to indemnify Coonrod & Associates and Aetna Casualty & Surety for all costs and benefits paid in this claim. No order is entered against American States Insurance Company because it has consistently represented that P.A. Brown & Associates did not have workers compensation insurance coverage with it on the date of accident and that its coverage began after that date. The parties have not contested that contention.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey dated June 6, 1994 should be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Jon M. Hilton, Sr., and against the respondent, Coonrod & Associates Construction Company, Inc., and its insurance carrier, Aetna Casualty & Surety Company, for an accidental injury which occurred January 16, 1991 and based upon an average weekly wage of \$864.00, for 74 weeks of temporary total disability compensation at the rate of \$278.00 per week in the sum of \$20,572.00 and 341 weeks of permanent partial disability compensation at the rate of \$224.65 per week in the sum of \$76,605.65 for a 39% work disability, making a total award of \$97,177.65.

As of December 29, 1995, there is due and owing claimant \$20,572.00 in temporary total compensation and 184.29 weeks of permanent partial compensation at the rate of \$224.65 per week in the sum of \$41,400.75 making a total due and owing of \$61,972.75, less compensation previously paid. The remaining balance of \$35,204.90 is to be paid for 156.71 weeks at the rate of \$224.65 per week, until fully paid or further order of the Director.

Future medical benefits may be awarded upon proper application and approval of the Director. Unauthorized medical expense of up to \$350.00 is ordered paid to claimant upon presentation of proof of payment.

Claimant's attorney fee contract is approved to the extent it is not inconsistent with K.S.A. 44-536.

The respondent, P.A. Brown & Associates, is ordered to reimburse and indemnify Coonrod & Associates Construction Company, Inc., and Aetna Casualty & Surety for all costs and benefits paid in this claim.

The orders of the Special Administrative Law Judge that are not inconsistent with the above are hereby adopted by the Appeals Board.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed to the respondent to be paid directly as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Barber & Associates Transcript of Regular Hearing	\$ 99.10
Deposition of Ernest Schlachter, M.D.	\$240.00
Kelley, York & Associates, Ltd. Transcript of Proceedings	\$245.50
Deposition of Jerry Hardin	\$332.00

IT IS SO ORDERED.

Dated this ____ day of January 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James B. Zongker, Wichita, Kansas
Michael T. Harris, Wichita, Kansas
Edward D. Heath, Jr., Wichita, Kansas
J. Philip Davidson, Wichita, Kansas
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director